Supreme Court, U.S.
FILED
NOV 24 1993
THE CLERK

93-928

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS, *etc., et al.*,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, *etc., et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

RENEA HICKS*
State Solicitor
**Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

Attorneys for State Petitioners

November 24, 1993

QUESTION PRESENTED

Whether the Court should exercise its supervisory power to correct the Fifth Circuit's error in refusing to grant a joint motion by the plaintiffs and the state to remand the case to the district court for consideration and effectuation of a settlement approved by the Governor, the Attorney General, the Secretary of State, the Lieutenant Governor, the Speaker of the House, and a majority of both houses of the Texas Legislature, but opposed by one of fifteen official-capacity state defendants and two personal-capacity defendant-intervenors?

PARTIES TO THE PROCEEDING

The participating parties in the proceeding below were:

League of United Latin American Citizens ("LULAC") Local Council No. 4434, LULAC Local Council No. 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Maryellen Hicks in her personal capacity, and Reverend James Thomas, *Plaintiffs*;

Houston Lawyers' Association, Weldon Berry, Alice Bonner, Reverend William Lawson, Bennie McGinty, Deloyd Parker, and Francis Williams, *Plaintiff-Intervenors*;

Jesse Oliver, Fred Tinsley, and Joan Winn White, *Plaintiff-Intervenors*;

In their official capacities only, Dan Morales, Attorney General of Texas; John Hannah, Secretary of State of Texas; and the current members of the Judicial Districts Board of Texas (Thomas R. Phillips, Michael J. McCormick, Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, Olin B. Strauss, Darrell Hester, William E. Moody, Weldon Kirk, Clyde R. Ashworth, Ray D. Anderson, Joe Spurlock, II, and David A. Talbot, Jr.), *Defendants*; and

In their personal capacities only, Judge F. Harold Entz and Judge Sharolyn Wood, *Defendant-Intervenors*.

TABLE OF CONTENTS

	Page(s):
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page(s):
Baker v. Carr, 369 U.S. 186 (1962)	8
Charles Scribner's Sons v. Marrs, 262 S.W. 722 (Tex. 1924)	10
Chisom v. Edwards, 970 F.2d 1408 (5th Cir. 1992)	4
Evans v. Jeff D., 475 U.S. 717 (1986)	5
Houston Lawyers' Association v. Attorney General of Texas, 111 S.Ct. 2376 (1991)	3
Karcher v. May, 108 S.Ct. 388 (1987)	9
Kentucky v. Graham, 473 U.S. 159 (1985)	9
League of United Latin American Citizens Counsel No. 4434 v. Attorney General of Texas, No. 93-630 (U.S. S.Ct.)	1
Local Number 93, International Ass'n of Firefighters v. City of Cleveland 478 U.S. 501 (1986)	8
Marek v. Chesny, 473 U.S. 1 (1985)	5
Maryland v. United States, 460 U.S. 1001 (1983)	6
McDaniel v. Sanchez, 452 U.S. 130 (1981)	4

New York v. Uplinger, 467 U.S. 246 (1984) 10

Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748 (1992) 5

Scott v. Exxon Corp., 763 S.W.2d 764 (Tex. 1988) 10

Shaw v. Reno, 113 S.Ct. 2816 (1993) 9

Terrazas v. Ramirez, 829 S.W.2d 712 (Tex. 1991) 10

Thornburg v. Gingles, 478 U.S. 30 (1986) 7

Wise v. Lipscomb, 437 U.S. 535 (1978) 6

Constitution:

TEX. CONST. art. IV, § 22 10

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS, *etc., et al.*,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, *etc., et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

This filing is a cross-petition to the petition for writ of certiorari pending before the Court in *League of United Latin American Citizens Council No. 4434 v. Attorney General of Texas*, No. 93-630 ("*LULAC* petition"). The Attorney General of Texas cross-petitions on behalf of fifteen state officials who were joined in this case only in their official capacities. Hereinafter, both for simplicity and because of the rifts explained in the following paragraph, the state petitioners collectively will be termed the "state."

Served 10-26-93.

The fifteen official-capacity state petitioners are: (i) the Attorney General; (ii) the Secretary of State of Texas; and (iii) the thirteen-member Judicial Districts Board of Texas, chaired by the Chief Justice of the Supreme Court of Texas. These state officials have varying opinions on

the proper disposition of this case, and one of them -- the Chief Justice -- retained private counsel to represent his views on settlement to the Fifth Circuit sitting en banc. Inasmuch as the Attorney General perceives his state constitutional duties to require presentation of a unified position for the state under these circumstances, he files this cross-petition on behalf of the state in his capacity as the state's chief legal officer.

The respondents are Judge Entz of Dallas County, Texas, and Judge Wood of Harris County, Texas, both of whom intervened as defendants in this suit only in their personal capacities. Hereinafter, unless the context requires more specificity, they together will be termed the "incumbent judges." Because of the Attorney General's position that, as the state's chief legal officer, he must present a unified state position for all the official-capacity state parties in the suit, the state's Chief Justice as chair of the Judicial Districts Board is not denominated a respondent, although he was permitted to express opposition to the settlement through retained private counsel before the Fifth Circuit sitting en banc in the second round of appeals in this case.

OPINIONS BELOW

The opinions below are reproduced in the appendices to the *LULAC* petition and the state's Memorandum in Response to Petition for Writ of Certiorari, which is being filed simultaneously with this cross-petition (and which will be termed the "state's Memorandum Response").

STATEMENT OF THE CASE

The Statement of the Case at pages 2-6 of the state's Memorandum Response fully canvasses the case for purposes of this cross-petition and will not be replicated here.

REASONS FOR GRANTING THE WRIT

By the time the Fifth Circuit heard oral argument en banc in the current phase of this case, a substantial part of the state's trial judiciary had been under sustained voting rights attack for five years. A trial court had found that the challenged electoral system violated the antidiscrimination principle of section 2 of the Voting Rights Act in all nine targeted counties.

Following the district court's liability ruling, affected minority voters momentarily gained hope when the state and the successful plaintiffs reached agreement on an interim election plan. That agreement was aborted, however, when the district court altered a critical provision.

Then, even in the face of the findings that large segments of the state's citizens were subject to illegal discrimination, and the social and political repercussions of such findings, the state continued to defend its judicial election system through first a panel and then the full contingent of the Fifth Circuit. The state still continued its defense before this Court, but ultimately was rebuffed on the basic question of section 2 coverage in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991) ("*HLA*"). The state's trial judiciary returned to the limbo it had been in since the suit was filed.

Even on remand after *HLA*, the state continued its dogged defense. After successfully resisting remand of the case to the district court, the state argued to a panel of the Fifth Circuit that the facts of its system satisfied the standards of section 2. More than a year passed after the argument, with the state, the affected minorities, and the anxious trial judiciary awaiting a decision on the legality of

its system and the difficult racial issues raised in the case. Negotiations resumed. The long wait ended with a panel decision finding illegality in all except one of the nine counties.

Shortly after this ruling, the state intensified its negotiations with the plaintiffs and reached an agreement with them. The agreement would not necessarily conclude the litigation, because it was subject to a fairness hearing before the district court; however, it pointed toward a conclusion to the long and difficult ordeal for the state judiciary. The state leadership approved the accord. It was signed by the Governor, the Lieutenant Governor, the Speaker of the House, the Attorney General, and the Secretary of State. It was approved by a majority vote of the membership of both houses of the Texas Legislature.

Then, the same state whose history of mistreatment of minorities was so shameful that it was subjected to the inverted federalism of preclearance under section 5 of the Voting Rights Act turned to the federal courts to settle this divisive racial issue amicably. The agreement was presented to the en banc Fifth Circuit, which was asked to abate further consideration of the merits and return the case to the district court where all those concerned with one aspect or another of the proposal could be heard in an evidentiary setting.[1] The Fifth Circuit only a short time before had approved precisely such an approach in the settlement of a Louisiana voting rights challenge to a judicial selection system. *See Chisom v. Edwards*, 970 F.2d 1408 (5th Cir. 1992).

---

[1] The proposed settlement would have to go through the section 5 preclearance process before adoption by the district court. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

This time, though, the Fifth Circuit insisted on reaching the merits and refused to return the settlement to the district court for a hearing. The reasons the court offered for refusing to permit a hearing were that the two incumbent judges from Dallas and Harris Counties (whose districts would be unaffected) opposed it, the Chief Justice opposed it, and, anyway, as was set forth in the remainder of the opinion, the system was legal so there was no basis for settling.

In making this ruling, the Fifth Circuit contradicted this Court's expressed preference for settlements, conferred standing and obstructionist authority on two personal-capacity intervenors far broader than the law warrants, and ignored binding state and federal law which makes the state the real party in interest here and its Attorney General the spokesperson for the state in court.

Federal courts have long been directed to operate in a way that encourages settlements. This Court has rejected propositions of law for the policy reason that doing so "could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 763 (1992). The underlying premise of the rule of law adopted in *Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding it permissible in civil rights cases to bargain over merits and fee issues simultaneously), is that settlements are a preferred alternative to litigation. In fact, civil rights actions are to be treated no differently than other civil actions in terms of settlement. *Id.* at 732 (citing *Marek v. Chesny*, 473 U.S. 1 (1985)).

This preference for settlement is so strong that federal courts are permitted to place their imprimatur on consent decrees that go beyond constitutional minimums, *Rufo*, 112 S.Ct. at 762-63, and, in a matter even more pertinent here, that operate through the Supremacy

Clause of the Constitution to override contrary state law. *See Maryland v. United States*, 460 U.S. 1001 (1983) (summary affirmance rejecting, as explained in a dissent by then-Justice Rehnquist, states' claim that federal consent decree could not be adopted if it would override state laws).[2]

Principles governing remedies in voting rights cases indicate that settlements are preferred over court resolution to perhaps an even greater degree in that arena than others. Governments under voting rights attack are encouraged by the case law to solve their problems themselves. In the leading case on remedy once voting rights liability has been determined, *Wise v. Lipscomb*, 437 U.S. 535 (1978), both the plurality opinion of Justice White and the concurrence of Justice Powell emphasized the importance of offering state legislative bodies the opportunity to adopt voting rights remedies reflecting the policy choices of elected officials. 437 U.S. at 540; *id.* at 548 (preferring such choice to "directive" from federal court).

Consideration by this Court of the Fifth Circuit's discouragement -- indeed, obstruction -- of settlement in a voting rights setting is important to states and other governing bodies. When their at-large electoral systems are challenged, they are faced with a fact-intensive judicial investigation grounded in, as Chief Justice Rehnquist phrased it, a "highly amorphous theory," *Wise v. Lipscomb*, 437 U.S. at 550 (concurrence). The Fifth Circuit effectively forces the states to remain on the legal field of battle regardless of time, cost, and (perhaps most

---

[2] This case also stands as authority rejecting the argument made by the two incumbent judges that the state cannot even obtain a hearing on a proposed consent decree whose effect would override a state constitutional provision.

significantly in the context of governing a pluralistic citizenry) divisiveness.

Of particular importance here is the fact that the Fifth Circuit's compelled litigation approach conflicts with one of the animating purposes of the 1982 amendments to the Voting Rights Act. The Court has observed that one of the principles underlying congressional adoption of the results test in section 2 was to lessen the chance for this kind of case to engender bitterness in the community. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) ("unnecessarily divisive").

It is important, not to mention consistent with federalism principles and amended section 2, for this Court to give the states more breathing room. Less constrictive alternatives should be made available to the states than the Fifth Circuit's adoption of a principle of compelled peristalsis of a bitterly fought, racially-charged case through the entire length of the federal judicial process.

The two incumbent judges, both white and both claiming that the settlement was a partisan effort against the side on which they were partisan, were permitted to foreclose even a hearing on a proposed solution which affected them not at all as incumbent judges, not at all in the seven counties where they cannot vote for state district judges, and only minimally (as one of hundreds of thousands) as voters in the two counties in which they may vote for state district judges.

The proposed settlement, which would preserve the two incumbent judges' seats in their current form as countywide judicial districts, simply did not affect them in their personal capacities as district judges. Thus, if they are to have standing to attack it, the source of their standing must come from elsewhere.

As voters, the two incumbent judges might have some arguable basis for standing insofar as their two counties are concerned; yet, under *Baker v. Carr*, 369 U.S. 186 (1962), their standing as voters certainly stretches no further than those two county lines. 369 U.S. at 204-08 (delineating voting rights standing principles). Beyond those lines, their rights as voters in elections for state district judges are unaffected, and they have no standing to impede settlement efforts.

The Fifth Circuit gave the incumbent judges the far-reaching power to prevent even a hearing on a proposed settlement in the face of this Court's clear admonition:

> It has never been supposed that one party ... could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitle to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent.

Local Number 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 528-29 (1986).

Thus, even if the two incumbent judges have standing as voters in their two counties, governing law does not permit them to stop a remand for hearing on settlement. Once again, it is important for this Court to afford states and other governing bodies an opportunity to at least obtain a hearing on the settlement of such contentious suits. The Fifth Circuit's approach effectively forecloses such a possibility because there is always bound to be at least *one* affected voter disagreeing with a voting rights settlement, which is by nature a *group* settlement. *Cf.*

Shaw v. Reno, 113 S.Ct. 2816, 2846 (1993) (J. Souter, dissenting).

The third reason for the Fifth Circuit's rebuff of settlement efforts was that the state's Chief Justice, as chair of the Judicial Districts Board, objected. This rationale is as erroneous, and raises issues as important to the settlement rules for voting rights cases, as the two reasons discussed above.

The Chief Justice is only one among fifteen official-capacity defendants who have been in this suit for over the last five years. As explained at the outset of this cross-petition, these fifteen officials are not of one mind about the settlement of this case. Undoubtedly, they are not of one mind about any one of the many issues raised by this lawsuit. There is no realistic basis for assuming otherwise.

Yet, this absence of unanimity cannot be an impediment to efforts to obtain at least a hearing on settlement. Otherwise, there would be yet another factor which effectively makes settlement of voting rights suits an impossibility.

Preexisting legal doctrines announced by this Court, but completely ignored by the Fifth Circuit, prevent this legal impasse from being the law. In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court directed that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." 473 U.S. at 166. "[T]he real party in interest is the entity." *Id.* This crucial point has been emphasized time and again by the Court. *See, e.g., Karcher v. May*, 108 S.Ct. 388, 393 (1987) (explaining fundamental difference between personal and official capacity parties and observing that "[w]e have repeatedly recognized that the real party in

interest in an official-capacity suit is the entity represented and not the individual officeholder").

When, as here, the state is the real party in interest, state law is determinative of who may speak for the state in federal court. *New York v. Uplinger*, 467 U.S. 246, 247-48 n.1 (1984). Notwithstanding the Fifth Circuit's authorization of privately retained counsel for the Chief Justice, Texas law is clear that the Attorney General speaks for the state in these settings.

The Texas Constitution designates the Attorney General as the state's chief legal officer. TEX. CONST. art. IV, § 22, interp. commentary (Vernon 1984). As such, he is the sole state official authorized by law to speak for the collective interests of the state in civil litigation and is cloaked with "broad judgment and discretion," remaining free to exercise his discretionary authority in an independent manner "which will not be controlled by other authorities." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924). This broad authority extends to the control of litigation involving other statewide constitutional officers. *See Scott v. Exxon Corp.*, 763 S.W.2d 764, 767 (Tex. 1988) (error for court to rely on stipulation signed by Land Commissioner, because it was not approved by the Attorney General). This broad authority recently has been recognized by seven justices of the Supreme Court of Texas who agreed that the Attorney General is "constitutionally empowered to execute a settlement agreement" in litigation challenging a legislative redistricting plan. *Terrazas v. Ramirez*, 829 S.W.2d 712, 747 (Tex. 1991) (summary by dissent).

Thus, none of the reasons proffered by the Fifth Circuit for refusing even a hearing on settlement, thereby insisting on reaching the merits of this complex, multi-county case, survives analysis. The laboriousness of refuting the multifarious rationale of the lower court

should not be permitted to obscure a quite basic point. A federal appellate court has established a rule whose practical effect is to compel states and other governments to *never* reach an accommodation with plaintiffs in voting rights litigation, no matter what the facts and no matter how critical and divisive the issue at stake. The adoption of this principle gains even more significance from the fact that it was done by the Fifth Circuit, long one of the prime fonts of voting rights law.

It is a pernicious result, bound to always leave festering the very divisiveness which Congress sought to avoid in enacting the 1982 amendments to the Voting Rights Act. The deleterious effect on voting rights jurisprudence of effectively removing the settlement option cries out for action by the Court. The states need to know the rules in these cases, and a decision by this Court in this case would give them much needed guidance.

CONCLUSION

This cross-petition for writ of certiorari should be granted.

Respectfully submitted,

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Deputy
Attorney General

JAVIER P. GUAJARDO
Special Assistant
Attorney General

November 24, 1993

DAN MORALES
Attorney General of Texas

RENEA HICKS*
State Solicitor
**Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

Attorneys for State Petitioners